No. 12,844

IN THE

United States Court of Appeals

For the Ninth Circuit

GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY (a corporation),
Appellant,

vs.

H. V. CARTER CO., INC. (a corporation),
Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

APPELLEE'S PETITION FOR A REHEARING.

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Table of Authorities Cited

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The Court of Appeals in its opinion determined that the District Court lacked jurisdiction *in personam* over Gravely Company "because a service of summons on one John W. Heinen, General Manager of Gravely-Pacific, Inc., a corporate subsidiary of Gravely Company, was not a service on it." The opinion then proceeds to devote two short paragraphs

to the all-important question of whether or not the record established that Gravely Company was doing business in the State of California at the time of the service of process. The first paragraph devoted to this subject merely states that the court agrees with our opponent's contention that it was not doing business in California, and in the second paragraph the court seems to feel that in order to prove that a foreign corporation is doing business in another state, it must be established that such foreign corporation delivered merchandise into that state.

While this may be true if there is no other evidence in the record, in the instant case the evidence adduced at the trial conclusively shows that Gravely Company was doing business in California, not by reason of any activities of its own in California, but by reason of the activities of its agent, to-wit, Gravely-Pacific, Inc.

The opinion of the court then attributes a number of contentions to Carter Co., which we respectfully submit were never contended for by it in any of its briefs at the trial of the action or otherwise, specifically:

(a) Carter Co. does *not* contend that Heinen was Gravely Company's agent for the service of process.

(b) Carter Co. does *not* claim that Heinen as General Manager of Gravely-Pacific, Inc. is a person authorized by Gravely Co. to receive service of process.

(c) Carter Co. does *not* contend that the relationship between the two corporations warranted the District Court inferring such an authorization as the basis of its denial of the Motion to Quash.

(d) The Motion to Quash was *not* submitted on affidavit alone without *viva voce* testimony.

(e) Carter Co. does *not* contend that Hall in all likelihood would be advised by letter from Heinen of the latter's receipt of summons in February 1947.

Carter Co. *does* contend, and we believe the record supports the contention, that Gravely Co. was doing business in California at the time of service of summons upon Heinen by virtue of the activities of its agent, Gravely-Pacific, Inc. Gravely-Pacific, Inc. being a corporate agent, service upon it must be made upon one of its officers, or upon the person designated by it as its agent for service of process. That person, the record discloses, was Heinen. Accordingly, Heinen was not served individually, but merely as the agent for the service of process upon Gravely-Pacific, Inc., and Gravely-Pacific, Inc. was served in two capacities:

1. As a defendant in the action;

2. As the corporate agent for and on behalf of Gravely Company.

Carter Co. *does* contend that Gravely-Pacific, Inc. was the general manager of Gravely Company in California by reason of its numerous activities in California on behalf of Gravely Company. To cite but

one, we refer to Gravely-Pacific's notification to Carter Co. dated August 23, 1946, terminating Carter Co.'s future services on *behalf* of Gravely Co. (Plaintiff's Exhibit 3.) No one but a general manager, in our opinion, would have authority to fire a dealer or distributor who had acted in such capacity for the principal for over twenty years.

Carter Co. *does* contend that Gravely-Pacific, Inc. was the wholly owned subsidiary of Gravely Co., and in addition thereto was its agent or general manager, and that it is for the latter reason that the California courts acquired jurisdiction over Gravely Co. rather than the mere fact of the subsidiary character of the one corporation to the other.

It is our belief that under the law of California the test of whether or not a foreign corporation is doing business in California is a relatively simple one. The rule is to be found in *Sales Affiliates, Inc. v. Superior Court,* 96 Cal. App. (2d) 134, 214 Pac. (2d) 541. The rule laid down by the court in that case is certainly broad enough to be determinative of the question presented in the instant case. It may be that the facts in that case were stronger than in the instant case, but the rule announced by the court as the sole determining factor in cases of this character fits the present case to a "T":

> "If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating

> through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process."

This is the test laid down by the court in the *Sales Affiliate* case, without qualification. The court does *not* state that the evidence must show that the foreign corporation delivers goods into California, or that the representation cannot be by a corporate agent as well as an individual agent, nor does it require the court to make inferences in lieu of evidence.

The Court of Appeals in the instant case recognizes that the law of California controls, for early in its opinion it states:

> "The burden of proving a jurisdictional service within the California law is upon Carter Co."

This means that the case of *Cannon Manufacturing Co. v. Cudahy Packing Co.,* 267 U.S. 333 strongly relied upon by Gravely Co. and favorably cited and quoted from by the court in the instant case is not, in our opinion, determinative on the question of jurisdiction for the reason that in that case the Supreme Court was interpreting the law of North Carolina rather than the law of California, and hence the decision is not controlling.

We have read the opinion of the court in this case a great number of times, and we are unable to determine exactly what test this court applies on the subject of either doing business or of proper service on a foreign corporation in California. We feel the

court reached erroneous conclusions from erroneous facts, and accordingly a new hearing should be granted the appellee in order to set the records straight.

Dated, San Francisco, California,
December 24, 1951.

Respectfully submitted,
CARROLL, DAVIS & FREIDENRICH,
By DAVID FREIDENRICH,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 24, 1951.

DAVID FREIDENRICH,
Of Counsel for Appellee and Petitioner.